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22 **UNITED STATES DISTRICT COURT**
23 **DISTRICT OF ARIZONA**

24 CWT Canada II Limited Partnership, an
25 Ontario, Canada Limited Partnership; and
26 Resource Recovery Corporation, a Delaware
27 Corporation,

28 Plaintiffs,

v.

Elizabeth J. Danzik, an individual; and Deja
II, LLC, an Arizona Limited Liability
Company

Defendants.

And related claims.

Case Nos.: 2:16-cv-00607-PHX-DGC
2:16-cv-02577-PHX-DGC

**REPLY IN FURTHER SUPPORT
OF CWT PARTIES' MOTION FOR
SUMMARY JUDGMENT
AGAINST KER AND CARRIGAN
AND OPPOSITION TO
DEFENDANTS' CROSS MOTION
FOR SUMMARY JUDGMENT**

Oral Argument Requested

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1 Plaintiffs CWT Canada II Limited Partnership and Resource Recovery Corporation
2 (collectively, the “CWT Parties”) submit this memorandum of points and authorities in
3 (1) further support of their motion for summary judgment under Fed. R. Civ. P. 56(a) on
4 (a) their conversion claim against Defendants Tony Ker (“Ker”) and Richard Carrigan
5 (“Carrigan”) related to the stolen tax credits, (b) all Ker’s and Carrigan’s defenses to this
6 claim, and (c) Ker’s defamation counterclaim; (2) support of their motion for this Court
7 to, if necessary, deem the CWT Parties’ Second Amended Complaint (Bridges Dkt. No.
8 56) amended to include a conversion claim against Ker and Carrigan; and (3) opposition
9 to Ker’s, Carrigan’s, and Defendant Elizabeth J. Danzik’s (“Elizabeth”) cross motion for
10 summary judgment (Dkt. No. 165). The CWT Parties also submit the Eilender Opposition
11 Declaration (“Eilender Opp. Decl.”) in opposition to Ker’s, Carrigan’s, and Elizabeth’s
12 cross motion.¹

13 MEMORANDUM OF POINTS AND AUTHORITIES

14 PRELIMINARY STATEMENT

15 In their opening brief, the CWT Parties showed that under Arizona law, a corporate
16 director who “**votes for the commission of a tort is personally liable**, even though the
17 wrongful act is performed in the name of the corporation.” *Arizona Tile, LLC v. Berger*,
18 223 Ariz. 491, 496 (Ariz. Ct. App. 2010) (emphasis added). Here, as the CWT Parties
19 showed in their opening brief, Ker and Carrigan are liable for conversion as a matter of
20 law based on two undisputed facts: (1) the New York court held that RDX converted the
21 tax credits from the CWT Parties by wrongfully withholding them, and (2) Ker and
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24
25 ¹ References to “Dkt. No.” are to docket entries in the action captioned *CWT Canada II*
26 *Limited Partnership, et al., v. Danzik, et al.*, No. 2:16-cv-00607. References to “Bridges
27 Dkt. No.” are to docket entries in the action captioned *CWT Canada II Limited*
28 *Partnership et al., v. Bridges, et al.*, No. 2:16-cv-02577. References to “Dennis Dkt. No.”
are to the action captioned *Danzik, et al., v. CWT Canada II Limited Partnership, et al.*,
No. 2:17-cv-00969.

1 Carrigan affirmatively authorized RDX to withhold the tax credits. The first fact is
2 conclusive here, because—as explained in the CWT Parties’ opening brief and below—
3 Ker and Carrigan are in privity with RDX, and are thus precluded from challenging this
4 factual finding. And the second fact is undisputed by the record here, and shows that Ker
5 and Carrigan are personally liable for RDX’s conversion as primary tortfeasors (and not
6 as aiders and abettors) as a matter of law—because under Arizona law, a corporate
7 director is personally liable for the corporation’s conversion as a primary tortfeasor if he
8 “participate[s]” in the conversion by voting for or approving it. *Bellas Artes De Mexico,*
9 *Inc. v. Argento LLC*, 2017 WL 6459826, at *6 (Ariz. Ct. App. Dec. 19, 2017).

11 In opposition, Ker and Carrigan rely almost exclusively on a technicality about the
12 CWT Parties’ complaint—that the complaint asserts a claim against them only for aiding
13 and abetting conversion, rather than for conversion itself. And according to Ker and
14 Carrigan, aiding and abetting conversion requires a higher mental state than conversion
15 itself, so they should escape liability for affirmatively authorizing RDX to withhold the
16 tax credits from the CWT Parties—which the New York court conclusively and
17 preclusively held was a conversion.

19 But Ker and Carrigan ignore that “[a] party need not plead specific legal theories
20 in the complaint, so long as the other side receives notice as to what is at issue in the
21 case.” *Busker v. Wabtec Corp.*, 2018 WL 4233068, at *2 (9th Cir. Sept. 6, 2018) (citation
22 omitted). And as explained below, Ker and Carrigan have been on notice that the CWT
23 Parties were pursuing a conversion claim against them since the beginning of this case,
24 and they will not be prejudiced by allowing the complaint to be amended to conform to
25 the undisputed evidence showing that they are liable for conversion.

26 Alternatively, this Court should deem the complaint amended to include a claim
27 against Ker and Carrigan for conversion. Indeed, the “underlying purpose of Rule 15”—
28

1 which requires that leave to amend a pleading be freely granted—is to “‘facilitate
2 decisions on the merits, rather than on the pleadings or technicalities’” (*Lopez v. Smith*,
3 203 F.3d 1122, 1127 (9th Cir. 2000) (citation omitted), *quoted in Tobias v. United States*
4 *Dep’t of Justice*, 2017 WL 2417047, at *5 (D. Ariz. Mar. 2, 2017)). And the Ninth Circuit
5 recently held that under Fed. R. Civ. P. 15(b)—which applies here instead of Rule 16(b)—
6 the court should permit a party to amend its pleading to conform to the evidence
7 submitted on summary judgment. *See Desertrain v. City of Los Angeles*, 754 F.3d 1147,
8 1154 (9th Cir. 2014) (“[w]here plaintiffs ‘fail[] to raise [a claim] properly in their
9 pleadings,’ if they ‘raised it in their motion for summary judgment, they should [be]
10 allowed to incorporate it by amendment under Fed. R. Civ. P. 15(b),’” even if summary
11 judgment motion is made after amendment deadline in Rule 16 order) (alterations in
12 original) (citation omitted). Indeed, in *Desertrain*, the Ninth Circuit did exactly what the
13 CWT Parties ask this Court to do here—deem the complaint amended to include a claim
14 supported by the undisputed evidence and grant summary judgment on that claim. And as
15 a further alternative if the Court prefers a separate motion for leave to amend, the Court
16 should deny the CWT Parties’ summary judgment motion without prejudice, the CWT
17 Parties will bring a separate motion for leave to amend to assert a conversion claim
18 against Ker and Carrigan, and then the CWT Parties will renew their motion for summary
19 judgment on this claim. In any event, this Court should not allow Ker and Carrigan to
20 escape liability for conversion—when the undisputed evidence establishes their liability—
21 on a pleading technicality

22
23
24 Further, in their opening brief, the CWT Parties showed that res judicata and
25 collateral estoppel preclude Ker and Carrigan from asserting any of the New York Action
26 Defenses here, which include that (1) the CWT Parties defrauded RDX into entering into
27 the UPA; (2) RDX was entitled to retain the tax credits, either because of the CWT
28

1 Parties' alleged fraud or because of the terms of the UPA; (3) RDX and Dennis did not
2 convert the tax credits; (4) RDX was not required to keep the tax credits it received in a
3 segregated account, or RDX was permitted to spend the tax credits upon receipt; and
4 (5) the CWT Parties' tort claims are barred by the economic loss doctrine.
5

6 Ker and Carrigan do not dispute any of the CWT Parties' arguments about why res
7 judicata and collateral estoppel apply—including the CWT Parties' showing that res
8 judicata applies to issues and defenses, rather than just whole claims. Instead, Ker's and
9 Carrigan's sole argument concerning preclusion is that they are not in privity with RDX
10 because neither of them "'controlled' the New York litigation" or its "outcome." But
11 while the record shows that at least Ker controlled much of the New York Action, the
12 Court need not reach this issue, because control over a litigation is just one way—not the
13 only way—for privity to exist. Indeed, even if Ker and Carrigan did not control the New
14 York Action, under New York law, privity exists because RDX represented their interests
15 as directors when it defended itself in the New York Action. *See Watts v. Swiss Bank*
16 *Corp.*, 265 N.E.2d 739, 743 (N.Y. 1970) (privity extends to parties "'who control an
17 action although not formal parties to it,'" **and** "'those whose interests are represented by a
18 party to the action'"). And this is so because the actions that RDX was defending—its
19 decision to withhold the tax credits from the CWT Parties—are the exact actions for
20 which the CWT Parties seek to hold Ker and Carrigan liable here. So RDX's defense of
21 its (*i.e.*, Ker's and Carrigan's) actions in the New York Action was necessarily a defense
22 of Ker's and Carrigan's actions on its behalf.
23

24 Moreover, Ker and Carrigan do not dispute the CWT Parties' showing that even if
25 Ker and Carrigan are not precluded from asserting the New York Action Defenses (they
26 are), their defense that RDX was entitled to retain the tax credits—either because of the
27 CWT Parties' alleged fraud or because of the terms of the UPA—fails as a matter of law.
28

1 So this is an independent basis on which this Court can grant summary judgment on these
2 defenses.

3
4 Further, Ker does not oppose the CWT Parties' motion for summary judgment on
5 his defamation counterclaim. Indeed, in their opening brief, the CWT Parties showed that,
6 according to the undisputed evidence, all the allegedly-defamatory statements were made
7 in the context of litigation, and are thus protected by the litigation privilege. Ker does not
8 oppose this argument; submits no evidence refuting it; and either admits, or denies
9 knowledge or information about, the facts that support it. Thus, this Court should grant
10 summary judgment dismissing this claim.

11 Finally, Defendants' cross motion for summary judgment should be denied.
12 Defendants not only fail to submit a Statement of Undisputed Facts in support of this
13 motion as required by Local Rule 56.1—which is itself a basis to deny the motion—but as
14 explained below, also fail to show the absence of a genuine issue of material fact and
15 entitlement to judgment as a matter of law on the CWT Parties' claims.

16 **ARGUMENT**

17 18 **I. KER AND CARRIGAN FAIL TO REFUTE THE CWT PARTIES'** 19 **SHOWING THAT THEY ARE LIABLE FOR CONVERSION**

20 In their opening brief, the CWT Parties showed that Ker and Carrigan are liable for
21 RDX's conversion of the tax credits because (1) the New York court held that there is "no
22 question of fact that the tax credits belong to the CWT Parties," and that RDX
23 "indisputably" "wrongfully withheld" the tax credit checks from the CWT Parties—which
24 Ker and Carrigan are precluded from challenging; and (2) Ker and Carrigan affirmatively
25 authorized RDX to withhold the tax credits from the CWT Parties. *See Arizona Tile, LLC*,
26 223 Ariz. at 496 ("[a] director who actually votes for the commission of a tort is
27 personally liable, even though the wrongful act is performed in the name of the
28

1 corporation”). Dkt. No. 156 at 11-13.

2 In opposition, Ker and Carrigan argue they cannot be held liable for conversion
3 because, in their complaint, the CWT Parties assert only a claim for *aiding and abetting*
4 conversion against them, rather than for conversion itself. According to Ker and Carrigan,
5 “[a]n actionable conversion may occur notwithstanding a person’s lack of tortious intent
6 and even if an action is undertaken in good faith,” while aiding and abetting requires the
7 “defendant’s knowledge of the underlying tort.” Dkt. No. 165 at 9-12. And so Ker and
8 Carrigan argue that they should escape liability for conversion on this basis, and that this
9 motion should thus be denied. But Ker and Carrigan err.

11 **A. Ker and Carrigan Cannot Escape Liability Based on a Technical Pleading**
12 **Defect, Because They Have Known That the CWT Parties Were Pursuing**
13 **Claims for Conversion Against Them Since the Beginning of This Case**

14 ““A party need not plead specific legal theories in the complaint, so long as the
15 other side receives notice as to what is at issue in the case.”” *Busker*, 2018 WL 4233068,
16 at *2 (citation omitted).

17 Ker and Carrigan have been on notice that the CWT Parties were pursuing claims
18 against them for conversion since the beginning of this case. Indeed, in their motion to
19 disqualify Wilenchik & Bartness, P.C. from representing Carrigan—which the CWT
20 Parties made on May 17, 2017, before discovery began in earnest and before Ker was
21 even added as a defendant—the CWT Parties argued that Carrigan was liable for the
22 “theft of the Tax Credits, since under Arizona law, ‘corporate directors may be held
23 personally liable for **conversion** done in the name of a corporate’ if they ‘participate or
24 have knowledge amounting to acquiescence or be guilty of negligence in the management
25 and supervision of the corporate affairs causing or contributing to the injury.’” Bridges
26 Dkt. No. 54 at 11 (emphasis added).

27 And the CWT Parties reiterated this argument in their June 16, 2017 reply in
28

1 further support of their disqualification motion (Bridges Dkt. No. 70 at 5), and again in
2 their February 9, 2018 motion to strike (Dkt. No. 128 at 13), and again in their February
3 27, 2018 reply in further support of their motion to strike (Dkt. No. 136 at 7 (“Ker and
4 Carrigan are liable because they caused RDX to deposit and use the CWT Parties’ tax
5 credits—which was **conversion**”) (emphasis added) (citation omitted)).

6
7 Further, Ker’s and Carrigan’s counsel attended the depositions of RDX’s auditor—
8 Squar Milner—and former director—Kevin Bridges—and heard the CWT Parties’
9 counsel ask hours of questions about the warnings that Squar Milner and Bridges gave to
10 Ker and Carrigan about their lack of oversight of Dennis’s related-party transactions with
11 RDX. And Ker’s and Carrigan’s counsel cross examined both witnesses about these
12 issues. Ker and Carrigan thus cannot now claim that they did not know that these issues
13 were part of this case. *See Sagana v. Tenorio*, 384 F.3d 731, 736 (9th Cir. 2004) (“one
14 party’s pursuit of discovery on an issue put[s] the opposing party on notice of the issue”).

15
16 Moreover, the CWT Parties asserted claims against Ker and Carrigan for breach of
17 fiduciary duty. Bridges Dkt. No. 56 ¶¶ 131-39. And since breach of fiduciary duty against
18 a director may be proved by showing that the director was negligent or reckless in
19 carrying out his duties—regardless of intent—Ker and Carrigan were on notice that they
20 could be held liable on regardless of their tortious intent.

21 Thus, regardless of how the CWT Parties technically pleaded their claims, Ker and
22 Carrigan have known since the beginning of this case that the CWT parties were pursuing
23 them for conversion. And so Ker and Carrigan cannot escape liability for conversion by
24 relying on a technical pleading defect. *See Busker*, 2018 WL 4233068, at *2 (although
25 plaintiff raised breach of contract theory for first time on summary judgment, court should
26 have addressed claim on the merits because complaint could “fairly be read as containing
27 the factual basis for a breach of contract claim”); *Rother v. Lupenko*, 515 F. App’x 672,
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674 (9th Cir. 2013) (although complaint “did not spell out” plaintiff’s unpaid-break claims in “so many words,” defendants had “sufficient notice of those claims,” and so—because a party “need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case”—district court properly considered unpaid-break claim on summary judgment).

B. Alternatively, This Court Should Deem the CWT Parties’ Complaint Amended to Conform to the Undisputed Evidence Showing That Ker and Carrigan Are Liable for Conversion

While a formal amendment to the complaint is not necessary (as explained above), alternatively, this Court should deem the CWT Parties’ complaint amended to include a conversion claim against Ker and Carrigan. And as explained above, if the Court prefers a separate motion for leave to amend, the Court should deny the CWT Parties’ summary judgment motion without prejudice, the CWT Parties will bring a separate motion for leave to amend to assert a conversion claim against Ker and Carrigan, and then the CWT Parties will renew their motion for summary judgment on this claim.²

Under Fed. R. Civ. P. 15(b), a party may move during and even after trial to amend its pleading to conform to the evidence. The Ninth Circuit interprets this rule broadly, and allows for amendments under it to be made on summary judgment as well: indeed, the Ninth Circuit recently held that “[w]here plaintiffs ‘fail[] to raise [a claim] properly in their pleadings,’ if they “raised it in their motion for summary judgment, they should [be] allowed to incorporate it by amendment under Fed. R. Civ. P. 15(b).” *Desertrain*, 754 F.3d at 1154 (alterations in original) (citation omitted); *see also Jackson v. Hayakawa*, 605 F.2d 1121, 1129 (9th Cir. 1979) (because they raised unpled claim in their motion for summary judgment, plaintiffs “should have been allowed to incorporate it by amendment

² Even if the Court ultimately denies the CWT Parties’ renewed summary judgment motion, or even if the Court does not permit the CWT Parties to renew their summary judgment motion, the Court should still allow the CWT Parties to amend their complaint to include a conversion claim against Ker and Carrigan at trial.

1 under Fed. R. Civ. P. 15(b)").

2 While a party must normally also show good cause under Fed. R. Civ. P. 16(b) to
3 modify a scheduling order—like the one here, which set December 13, 2017 as the
4 deadline for amending the pleadings (Dkt. No. 102 ¶ 2)—this is not so when a party seeks
5 to conform the pleadings to the evidence at trial (or, as the Ninth Circuit has extended the
6 rule, on summary judgment) under Rule 15(b). *See Desertrain*, 754 F.3d at 1154
7 (applying only Rule 15(b)—and not Rule 16(b)—to amendment on summary judgment
8 motion even though summary judgment motion was made months after the deadline for
9 amending the pleadings under Rule 16 order); *see also Am. Family Mut. Ins. Co. v.*
10 *Hollander*, 705 F.3d 339, 350 (8th Cir. 2013) (court's denial of motion for leave to amend
11 under Rule 16(b) for lack of good cause "is not to say the pleadings could not be amended
12 to conform them to the evidence presented at trial" under Rule 15(b)).
13

14 And even if good cause were necessary (it is not), the CWT Parties have satisfied it
15 here. Indeed, the CWT Parties' counsel did not discover the Arizona cases defining the
16 elements of a primary liability for conversion by a director until after the complaint was
17 filed, and did not formally amend it before now because—despite repeatedly citing cases
18 and making arguments about why Ker and Carrigan would be liable for conversion as
19 primary tortfeasors—Ker and Carrigan never raised any issue with the CWT Parties'
20 pursuit of this claim. And if the CWT Parties are unable to pursue a conversion claim
21 now, they would be substantially prejudiced, given that—as explained in the opening brief
22 and below—the undisputed evidence shows that Ker and Carrigan affirmatively
23 authorized RDX to convert the tax credits, and are thus liable for conversion.
24

25 Under Rule 15(b)—which applies here—"[l]eave to amend shall be freely given
26 when justice so requires, and this policy is to be applied with extreme liberality.'" *See*
27 *Desertrain*, 754 F.3d at 1154 (citations omitted). Indeed, "this mandate is to be heeded"
28

(*GRK Holdings, LLC v. First Am. Title Ins. Co.*, 2010 WL 3940575, at *9 (D. Ariz. Oct. 6, 2010) (Campbell, J.) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)))—especially given that the ““underlying purpose of Rule 15”” is to ““facilitate decisions on the merits, rather than on the pleadings or technicalities”” (*Lopez*, 203 F.3d at 1127 (citation omitted)).

As explained below, this Court should deem the CWT Parties’ complaint amended to conform to the undisputed evidence showing that Ker and Carrigan are liable for conversion as a matter of law, or should at least allow the CWT Parties to make a separate motion for leave to amend and to then renew their summary judgment motion.

1. The Undisputed Evidence Shows That Ker and Carrigan Are Liable for Conversion as a Matter of Law

As the CWT Parties showed in their opening brief (Dkt. No. 156 at 11-13), the New York court conclusively—and preclusively—held that RDX converted the tax credits by withholding them from the CWT Parties. *See* Dennis Dkt. No. 60-16 at 6; Dennis Dkt. No. 60-22 at 14 n.13. And Ker and Carrigan do not dispute this.

The undisputed evidence also shows that Ker and Carrigan affirmatively authorized RDX to withhold the tax credits from the CWT Parties. *See* 56.1 ¶ 4; Dkt. No. 129-4 at 272:14-24 (Dennis bankruptcy testimony); Dkt. No. 129-2 at 250:4-12, 252:23-253:10 (Ker testimony); Bridges Decl. ¶ 7. Indeed, Ker does not—and cannot—dispute this. And Carrigan does not dispute this either, but argues only that he was “never aware of any decisions to pay out the tax credit funds,” and that the CWT Parties have “no evidence that he attended any critical board meetings when the board expressly considered and/or acted on such matters.” Dkt. No. 165 at 11-12 (emphasis omitted). But as the CWT Parties showed in their opening brief, Dennis, Ker, and Bridges all testified *without contradiction* that Carrigan affirmatively authorized RDX to withhold the tax credits. *See* Dkt. No. 156

at 8 n.2-4 (compiling testimony); 56.1 ¶¶ 4-5. And Carrigan’s testimony that he doesn’t remember this decision is not enough to create a genuine dispute of material fact. *See Derderian v. Sw. & Pac. Specialty Fin., Inc.*, 673 F. App’x 736, 738 (9th Cir. 2016) (nonmovant’s testimony that she “does ‘not recall’” is “not enough to create a genuine dispute” of material fact). Thus, Ker and Carrigan are liable as a matter of law for RDX’s conversion of the tax credits. *See Arizona Tile, LLC*, 223 Ariz. at 496 (“[a] director who actually votes for the commission of a tort is personally liable, even though the wrongful act is performed in the name of the corporation”).

Moreover, as Ker and Carrigan concede (Dkt. No. 165 at 9), “good faith belief or intention is no defense to a conversion claim” against corporate directors. *Sports Imaging of Arizona, L.L.C. v. 1993 CKC Tr.*, 2008 WL 4448063, at *13 (Ariz. Ct. App. Sept. 30, 2008). So Ker and Carrigan should not be able to escape liability by relying on “technicalities” in the complaint. *Lopez*, 203 F.3d at 1127.

2. Ker and Carrigan Cannot Show That Allowing the CWT Parties to Amend Their Complaint to Conform to the Undisputed Evidence Would Prejudice Them

As explained above, Ker and Carrigan have been on notice that the CWT Parties were pursuing claims for conversion against them since the beginning of this case—and thus cannot claim surprise.

Ker and Carrigan also cannot show that they would be prejudiced by this amendment. Specifically, Ker and Carrigan cannot show that they would have taken any additional discovery had the CWT Parties asserted a conversion claim against them from the outset. Indeed, there is no meaningful dispute that Ker and Carrigan affirmatively authorized RDX to withhold the tax credits, and any further evidence of Ker’s and Carrigan’s mental state or actions would come from *Ker* and *Carrigan* themselves—who were deposed and submitted declarations in opposition to this motion. *See* Dkt. Nos. 167-

1 68; *see also Desertrain*, 754 F.3d at 1154 (amendment at summary judgment permitted
2 when claim sought to be added “did not require further discovery”). Indeed, Ker and
3 Carrigan substantively oppose the CWT Parties’ motion for summary judgment on the
4 conversion claim (rather than just an aiding and abetting claim), and do not claim that they
5 need additional discovery to oppose it. Dkt. No. 165 at 12-13; *see also Desertrain*, 754
6 F.3d at 1154 (amendment at summary judgment permitted when parties “fully argued”
7 claim sought to be added in their “summary judgment briefings”).
8

9 Further, Ker and Carrigan vigorously opposed the CWT Parties’ motion to quash
10 their subpoenas to Candy Blazar, David Bogardus, and Brian Appel—yet even after this
11 Court denied the CWT Parties’ motion to quash, **Ker and Carrigan never bothered to**
12 **take these depositions**. So Ker and Carrigan cannot now complain that they would have
13 taken more discovery when they did not even bother to take the discovery they fought to
14 get.
15

16 **C. In Any Event, The Evidence Shows That Ker and Carrigan Are Liable for**
17 **Aiding and Abetting RDX’s Conversion of the Tax Credits**

18 **First**, as explained above, the New York court’s holdings—which as explained in
19 the CWT Parties’ opening brief (*id.* at 13-23), Ker and Carrigan are precluded from
20 challenging—establish that RDX converted the tax credits.

21 **Second**, as also explained above, the undisputed evidence shows that Ker and
22 Carrigan affirmatively authorized RDX to withhold the tax credits from the CWT Parties.

23 **Third**, the undisputed evidence shows that Ker and Carrigan had knowledge of the
24 acts RDX took to convert the tax credits, *i.e.*, withholding them from the CWT Parties,
25 because Ker and Carrigan affirmatively authorized those acts.

26 Ker and Carrigan erroneously argue that to be liable for aiding and abetting
27 conversion, they had to know that a “tort was being committed” by RDX when they
28

1 authorized RDX to withhold the tax credits. But their liability does not turn on whether
2 they literally knew that they were assisting RDX to take an action that was tortious;
3 instead, it turns on whether they knew that they were assisting RDX to withhold the tax
4 credits from the CWT Parties—which the New York court already held was conversion as
5 a matter of law. *See Torrance Const., Inc. v. Jaques*, 127 A.D.3d 1261, 1263 (N.Y. App.
6 Div. 3rd Dep’t 2015) (“A claim can exist for aiding and abetting conversion if the aider-
7 abettor has actual knowledge that the person who directly converted the plaintiff’s
8 property did not own that property.”); 56.1 ¶ 23 (New York court holding that “there is no
9 question of fact” that the tax credits “do not belong to” Dennis or RDX, that the tax
10 credits “either belong[] to the CWT Parties or the federal government,” and that “[n]o
11 matter” RDX’s “liquidity needs,” it is “not entitled to use this money because, regardless
12 of the outcome of this litigation,” RDX will “not keep the money”).

14 Further, Ker erroneously argues that he cannot be liable for aiding and abetting
15 conversion because he was “never advised that the transactions between RDX and DAS
16 on that contract were improper or tortious.” Dkt. No. 165 at 11. And Carrigan erroneously
17 argues that he cannot be liable for aiding and abetting conversion because “never intended
18 to act tortiously himself,” and thus “could not possibly be found conclusively to have
19 aided and abetted torts committed by Danzik or DAS.” *Id.* These arguments ignore that
20 Ker and Carrigan are liable for aiding and abetting **RDX’s** conversion of the tax credits—
21 not just Dennis’s and DAS’s conversion. *See Bridges* Dkt. No. 56 ¶ 141 (CWT Parties
22 alleging that Ker and Carrigan are liable for “aiding and abetting Danzik’s and/or RDX’s
23 commission” of, among other things, “conversion”). And as explained above, RDX’s
24 intentional withholding of the tax credits was conversion by **RDX**, and Ker and Carrigan
25 aided and abetted **RDX’s** conversion by authorizing RDX to withhold the tax credits.
26
27
28

1 **II. KER AND CARRIGAN FAIL TO REFUTE THE CWT PARTIES’**
 2 **SHOWING THAT ALL THEIR DEFENSES TO THE CWT PARTIES’**
 3 **CONVERSION CLAIM FAIL**

4 **A. Ker and Carrigan Fail to Refute the CWT Parties’ Showing That Res**
 5 **Judicata and Collateral Estoppel Preclude Them From Asserting the New**
 6 **York Action Defenses**

7 In their opening brief, the CWT Parties showed that Ker and Carrigan are
 8 precluded from asserting the New York Action Defenses. Specifically, the CWT Parties
 9 showed that res judicata precludes Ker and Carrigan from asserting these defenses
 10 because res judicata bars relitigation of specific issues and defenses (like the New York
 11 Action Defenses)—not just whole claims; because RDX raised or could have raised all
 12 these defenses in the New York Action; and because Ker and Carrigan are in privity with
 13 RDX, since they were RDX directors when RDX converted the tax credits and RDX
 14 represented their interests by defending their actions in the New York Action. The CWT
 15 Parties also showed that collateral estoppel precludes Ker and Carrigan from asserting
 16 these defenses because the New York court—after contested hearings in which RDX
 17 participated—repeatedly and specifically rejected these defenses (except for economic
 18 loss, which was never raised). Dkt. No. 156 at 13-23.

19 In opposition, Ker and Carrigan do not dispute that res judicata bars relitigation of
 20 specific issues and defenses, like the New York Defenses, and not just whole claims. *See*
 21 *Sterling Doubleday Enterprises, L.P. v. Marro*, 238 A.D.2d 502, 503 (N.Y. App. Div. 2nd
 22 Dep’t 1997) (defendant corporate officers’ and directors’ **“affirmative defenses”** were
 23 “barred by the doctrine[] of res judicata” when the corporation that these officers and
 24 directors served had a previous default judgment against it arising out of the same
 25 transaction or occurrence; *see also CIBC Mellon Tr. Co. v. HSBC Guyerzeller Bank AG*,
 26 56 A.D.3d 307, 308 (N.Y. App. Div. 1st Dep’t 2008) (because of a default in a prior case,
 27 res judicata barred defendants’ **“affirmative defense** of unclean hands”). And so Ker and
 28

1 Carrigan concede this. *See Gurasich v. IBM Ret. Plan*, 2016 WL 362399, at *4 (N.D. Cal.
2 Jan. 29, 2016) (defendants “concede” what they “do not dispute”).

3
4 In opposition, Ker and Carrigan also do not dispute that RDX raised or could have
5 raised the New York Action Defenses in the New York Action. And so Ker and Carrigan
6 also concede this.

7 In opposition, Ker and Carrigan also do not dispute that the New York court—after
8 contested hearings in which RDX participated—repeatedly and specifically rejected the
9 New York Action Defenses other than economic loss. And so Ker and Carrigan also
10 concede this.

11 Thus, Ker and Carrigan concede that—if they are in privity with RDX—then res
12 judicata and collateral estoppel preclude them from asserting the New York Action
13 Defenses.

14 Concerning privity, Ker’s and Carrigan’s sole argument is that neither of them
15 “‘controlled’ the New York litigation” or its “outcome.” Dkt. No. 165 at 16. But Ker and
16 Carrigan ignore that control over a litigation is just one way—not the only way—for
17 privity to exist. Indeed, separate and apart from whether a party controlled a prior
18 litigation, privity exists between a party in an action and “those whose interests are
19 represented by a party to the action.” *Watts*, 265 N.E.2d at 743. And because there is an
20 “‘identity of interests and close relationship’” between a corporation and its directors and
21 officers, “[c]ourts have found corporate directors and officers in privity with corporate
22 defendants.” *U.S. Secs. & Futures Corp. v. Irvine*, 2002 WL 34191506, at *4 (S.D.N.Y.
23 May 13, 2002) (citation omitted); *see also Tesla Wall Sys., LLC v. Related Companies,*
24 *L.P.*, 2017 WL 6507110, at *5 n.3 (S.D.N.Y. Dec. 18, 2017) (privity exists between
25 “corporate entities and their directors”); *JSC Sec., Inc. v. Gebbia*, 4 F. Supp. 2d 243, 251
26 (S.D.N.Y. 1998) (“‘corporations and their officers and directors are in privity for purposes
27
28

of res judicata”) (citation omitted).

Indeed, while the record shows that at least Ker controlled the New York Action on RDX’s behalf—despite Ker’s unsupported denials—privity exists here **regardless** of whether Ker and Carrigan controlled the New York Action. *See N. Am. Foreign Trading Corp. v. Chiao Tung Bank*, 1997 WL 193197, at *5 (S.D.N.Y. Apr. 18, 1997) (default judgment against one party precluded second party in privity, even though second party did not cause first party to default, and first party was “on the verge of bankruptcy and hence lacked the resources to pursue a lawsuit to its conclusion”). This is so because the basis for privity here is that Ker and Carrigan, as directors, controlled **RDX’s decision to deposit and use the tax credits**—which is what RDX defended in the New York Action—and so RDX represented Ker’s and Carrigan’s interests in the New York Action because RDX’s defense of its actions in the New York Action was necessarily a defense of Ker’s and Carrigan’s actions on its behalf. *See* Dkt. No. 156 at 18-19.

And since Ker and Carrigan do not dispute that they were RDX directors when RDX converted the tax credits, or that RDX represented their interests by defending their actions in the New York Action, they necessarily concede that the undisputed evidence shows that they are in privity with RDX—and can thus be precluded to the same extent as RDX.

B. Ker and Carrigan Are Precluded From Asserting Defenses Based on the Economic Loss Doctrine or Absence of “Identified Funds”

As explained in the CWT Parties’ opening brief (Dkt. No. 156 at 13-14) and above, res judicata applies to both “issues that were” raised, or issues that “could have been raised,” in “the prior proceeding.” *Yardeny v. Jordan*, 118 A.D.3d 985, 985 (N.Y. App. Div. 2nd Dep’t 2014) (emphasis added) (citation omitted).

Ker and Carrigan argue that the CWT Parties’ conversion claim is barred by the

1 economic loss rule, because “CWT alleges only economic damages arising out of its
 2 contractual relationship with Danzik and RDX.” Dkt. No. 165 at 14. Ker and Carrigan
 3 also argue that “[b]ecause the only provision of the UPA regarding the tax credits, Section
 4 2.3, contained no segregation term, and because the subject funds were not so segregated,
 5 there are no ‘identified’ funds to support a conversion claim for money.” *Id.* at 12.

6 But Ker and Carrigan ignore that RDX could have raised both defenses in the New
 7 York Action in response to the CWT Parties’ claim against RDX for conversion. *See*
 8 Dennis Dkt. No. 60-12 ¶¶ 161-64. Thus, res judicata would bar RDX from asserting this
 9 defense now, and since Ker and Carrigan are in privity with RDX, res judicata bars them
 10 too.
 11

12 **C. Ker and Carrigan Fail to Refute the CWT Parties’ Showing That Under**
 13 **the UPA, RDX Owed the Tax Credits to the CWT Parties and Was Not**
 14 **Entitled to Retain Them Even if the CWT Parties Defrauded It**

15 In their opening brief, the CWT Parties showed that even if Ker and Carrigan are
 16 not precluded from asserting the New York Action Defenses (they are), their defense that
 17 RDX was entitled to retain the tax credits—either because of the CWT Parties’ alleged
 18 fraud or because of the terms of the UPA—fails as a matter of law. Specifically, the CWT
 19 Parties showed that under the UPA and as the New York court held, the CWT Parties
 20 were indisputably entitled to the tax credits, and RDX indisputably had no right to
 21 withhold the tax credits, either as a “set-off” or otherwise. The CWT Parties also showed
 22 that even if RDX’s allegations that the CWT Parties defrauded it into entering into the
 23 UPA were true (they are not), RDX still would not be entitled to the tax credits, because
 24 they belonged either to the CWT Parties or to the federal government—not to RDX. Dkt.
 25 No. 156 at 23-25.

26 Ker and Carrigan “do not dispute,” and “therefore concede” this. *Gurasich*, 2016
 27 WL 362399, at *4. And so this is an independent basis on which this Court can grant
 28

summary judgment on these defenses.

III. KER FAILS TO DISPUTE THE CWT PARTIES' SHOWING THAT HIS DEFAMATION COUNTERCLAIM FAILS BECAUSE IT IS BARRED BY THE LITIGATION PRIVILEGE

In their opening brief, the CWT Parties showed that, according to the undisputed evidence, all the allegedly-defamatory communications that Noelting and MacFarlane had about Ker are protected by the litigation privilege, because they were at counsel's instruction, and either (i) in preparation for Dennis's and RDX's contempt hearing, or (ii) in furtherance of settlement talks. The CWT Parties also showed that Ker even admitted in his deposition that these allegedly-defamatory communications were made in connection with litigation. Dkt. No. 156 at 25-27.

In opposition, Ker does not even address this part of the CWT Parties' motion. And in his Counter-Rule 56.1 Statement, Ker either admits, or merely denies knowledge or information about, the facts that support the litigation privilege—and does not attempt to refute them. Dkt. No. 166 ¶¶ 47-56. Thus, this Court should grant summary judgment for the CWT Parties dismissing this claim.

IV. THIS COURT SHOULD DENY DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

As an initial matter, Defendants have failed to provide a 56.1 Statement of Undisputed Material Facts in support of their cross motion. Instead, the 56.1 Statement they filed relates solely to Ker's and Carrigan's opposition to the CWT Parties' summary judgment motion. This alone is a ground to deny the cross motion. *See* L.R. 56.1 ("failure to submit a separate statement of facts . . . may constitute grounds for the denial of the motion"); *see also Fernandez v. City of Phoenix*, 2012 WL 1985682, at *3 (D. Ariz. June 4, 2012) ("non-compliance" with L.R. 56.1 is an "an independent ground" for denying a

summary judgment motion).³

In any event, as explained below, Defendants’ cross motion should be denied on the merits as well.

A. Defendants Fail to Show That They Are Entitled to Summary Judgment on the CWT Parties’ Claims for Breach of Trust and Breach of Fiduciary Duty, and Aiding and Abetting These Torts

Defendants argue that they are entitled to judgment as a matter of law on the CWT Parties’ claims for breach of trust and aiding and abetting breach of trust because Section 2.3 of the UPA—which requires RDX to “allocate[] and distribute[]” the tax credits to the CWT Parties—(1) does not use the words “trust, a trustor, a trustee or a beneficiary,” and (2) “makes no reference to Carrigan, Ker or Danzik, in any capacity.” Dkt. No. 165 at 19. But none of this is necessary to create an express trust or to establish Carrigan and Ker’s liability for misappropriating trust funds.

First, it is well established that an agreement can “create an express trust without using the words ‘trust’ or ‘trustee.’” *In re Dreier LLP*, 452 B.R. 391, 421 (Bankr. S.D.N.Y. 2011) (citing 1 *Scott & Ascher on Trusts*, § 4.2). Rather, a trust is simply “a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit . . . one or more persons.” Restatement (Third) of Trusts § 2 (2003); *see also In re Kent*, 396 B.R. 46, 50 (Bankr. D. Ariz. 2008) (citing *Doss v. Kalas*, 94 Ariz. 247, 252 (Ariz. 1963)). Courts have held that “the crucial factor in determining whether a trust relationship is created in an agreement is the presence of a duty to segregate funds purportedly ‘held in trust.’” *In re Einhorn*, 59 B.R. 179, 184 (Bankr. E.D.N.Y. 1986); *see also In re Property Leasing & Management, Inc.*, 46 B.R. 903, 907-

³ Because Defendants have not identified any undisputed material facts in support of their cross motion, the CWT Parties have not submitted a Counter-56.1 Statement.

1 08 (Bankr. E.D. Tenn. 1985) (property management agreement created an express trust
2 when the manager was required to deposit rent payments into a segregated account for the
3 benefit of the property owners and its use of the funds was limited to payment of
4 operating expenses).

5
6 Here, as explained in the CWT Parties’ opening brief and above, RDX argued
7 unsuccessfully in the New York Action that it was not required to segregate the tax
8 credits, and was instead permitted to spend those funds upon receipt. Dkt. No. 129-16 at
9 3; *id.* at 8. The New York Court rejected these arguments. Dennis Dkt. No. 60-16 at 6;
10 56.1 ¶ 23. So Ker and Carrigan, who are in privity with RDX, are barred by *res judicata*
11 and collateral estoppel from disputing RDX’s obligation to segregate the tax credits funds
12 and to refrain from spending them—the critical hallmarks of a trust relationship.

13 Moreover, the UPA itself establishes RDX’s obligation to segregate and refrain
14 from spending the tax credit, as it provides that upon receipt the credit “***shall be allocated***
15 ***and distributed***” to the CWT Parties. Dkt. No. 60-7 § 2.3. Thus, even without the New
16 York court’s findings, the plain language of the UPA establishes the prerequisites for an
17 express trust—or at a minimum, creates a genuine issue of material fact precluding
18 summary judgment.

19
20 ***Second***, that the UPA does not mention Carrigan and Ker by name is likewise
21 irrelevant, since “an officer who causes a corporate trustee to commit a breach of trust
22 causing loss to the trust administered by the corporation is personally liable to the
23 beneficiaries for the loss.” *In re Baird*, 114 B.R. 198, 204 (9th Cir. BAP 1990) (citing
24 *G Ranching Co. v. Stewart Title and Trust*, 128 Ariz. 590, 593 (Ariz. Ct. App. 1981)).
25 There is no dispute that Carrigan and Ker authorized RDX to deposit the tax credits in its
26 general operating accounts and to spend the funds. Thus, they are individually liable for
27 the breach of trust, or alternatively for aiding and abetting RDX’s breach.
28

Concerning the CWT Parties' breach of fiduciary duty claim, that RDX held the tax credits in trust supports this claim (and the aiding and abetting claim). It is axiomatic that "[a] trustee owes fiduciary duties to trust beneficiaries, and breach of such a duty is a breach of trust." *Matter of Oakland Living Trust*, 2017 WL 2544836, at *2 (Ariz. Ct. App. June 1, 2017); *see also In re Escarcega*, 573 B.R. 219, 233 (9th Cir. BAP 2017) ("at common law, trustees owe a fiduciary duty of loyalty to the trust beneficiaries"). Thus, there is at least a genuine issue of material fact concerning whether Defendants were trustees and thus owed the CWT Parties fiduciary duties.

B. Defendants Fail to Show That They Are Entitled to Summary Judgment on the CWT Parties' Claims for a Constructive Trust Against Elizabeth

Defendants do not dispute that the record warrants imposition of a constructive trust on Elizabeth, who received a portion of the CWT Parties' tax credit funds via transfers from DAS to her personal account. Instead, they argue that the claim should be dismissed because "constructive trust is an equitable remedy tied to unjust enrichment," and not "an independent claim." Dkt. 165 at 19–20. But Defendants err.

Contrary to Defendants' argument, Arizona courts have recognized stand-alone claims for imposition of a "constructive trust." *See, e.g., Grantham v. Sims*, 2016 WL 4761318, at *4-6 (Ariz. Ct. App. Sept. 13, 2016) (affirming trial court's judgment in favor of plaintiff on claim for imposition of a constructive trust). And in any event, the CWT Parties assert a claim against Elizabeth for unjust enrichment and restitution based on her receipt of a portion of the tax credits. And Defendants do not dispute that a constructive trust is an appropriate remedy for that claim.

C. Defendants Fail to Show That They Are Entitled to Summary Judgment on the CWT Parties' Claims for an Accounting from Elizabeth

The CWT Parties are entitled to an accounting from Elizabeth, because the evidence shows that she received a portion of the tax credits, which a forensic accountant

1 traced to an account in her name. Defendants claim that there is no basis for an accounting
2 because (1) “there is no fiduciary relationship or any existing accounting complexity,” and
3 (2) the CWT Parties did not make a demand for an accounting that was refused. Dkt. 165
4 at 23. Both arguments are wrong.

5
6 As shown above, the tax credits were held in trust for the benefit of the CWT
7 Parties and were misappropriated, establishing a breach of fiduciary duty. That a portion
8 of the tax credits was transferred to Elizabeth does not “divest” those funds of their “trust
9 character.” *Republic Supply Co. of Cal. v. Richfield Oil Co. of Cal.*, 79 F.2d 375, 377 (9th
10 Cir. 1935). Thus, the CWT Parties are entitled to the same equitable remedies against
11 Elizabeth (the recipient of their trust funds) as they would be against the trustee or its
12 agents. Further, the web of accounts that Dennis used to convert the tax credits is
13 exceedingly complex. The CWT Parties are thus entitled to a full accounting from
14 Elizabeth to determine whether any other portion of their funds made their way to her
15 accounts.

16
17 Moreover, the CWT Parties did demand a full accounting from Elizabeth in a letter
18 to her counsel, dated January 19, 2016. Eilender Opp. Decl., Ex. A. But to date no such
19 accounting has been provided.

20 **CONCLUSION**

21 This Court should, if necessary, deem the CWT Parties’ Second Amended
22 Complaint (Bridges Dkt. No. 56) amended to include a conversion claim against Ker and
23 Carrigan; should grant summary judgment in the CWT Parties’ favor on this conversion
24 claim against Ker and Carrigan, Ker’s and Carrigan’s defenses to this claim, and Ker’s
25 defamation counterclaim; and should deny Ker’s, Carrigan’s, and Elizabeth’s cross
26 motion for summary judgment.
27
28

1 Dated: September 12, 2018
2 Phoenix, Arizona

3 Respectfully submitted,

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